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In the Supreme Court of the United States

October Term, 1958

GEORGE B. PEETE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a–21a; R. 7–25) is reported at 262 F. 2d 788. The opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 1a–5a) is reported at 147 F. Supp. 791.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1959 (R. 27). A petition for rehearing was denied on February 19, 1959 (R. 35). The petition for a writ of certiorari was filed on March 20, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conviction for conspiring to make false and fraudulent statements in proceedings before the Immigration and Naturalization Service, in violation of 18 U.S.C. 1001, barred his subsequent trial and conviction for the substantive offense of subornation of perjury in those proceedings.

STATUTES INVOLVED

18 U.S.C. 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

18 U.S.C. 1622 provides:

> Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on each count of a two count indictment charging subornation of perjury in violation of 18

U.S.C. 1622. He was sentenced to imprisonment for 6 months and to pay costs of the case (R. 5). The court of appeals unanimously affirmed his conviction (R. 7–25). The pertinent facts are these:

In 1952, petitioner, a Baltimore attorney, became counsel for George Kostatos, a defendant in deportation proceedings. The defense raised was that Kostatos was, in fact, a natural born citizen of the United States and thus not subject to deportation. Kostatos made such assertion, under oath, at a hearing held by the Immigration and Naturalization Service in Baltimore, Maryland, on February 14, 1952 (App. 30–52).[1] At hearings held in Philadelphia, Pennsylvania, on April 24, 1952, other witnesses residing in Pennsylvania appeared for Kostatos in support of this claim. At the third and final hearing held in Baltimore on June 16, 1952, one Louis Sitaras[2] testified under oath that Kostatos was an American citizen (App. 71–82).

On August 31, 1954, petitioner and others were indicted in the United States District Court for the Eastern District of Pennsylvania for conspiring to make false and fraudulent statements to an agency of the United States in violation of 18 U.S.C. 1001 (count 1), and conspiring to prevent the deportation

[1] "App." refers to petitioner's appendix in the court of appeals, which is designated "R. I" in the record now before this Court.

[2] Two individuals named "Louis Sitaras" were involved in these proceedings. One, a resident of Pennsylvania, testified in Kostatos' behalf at the Philadelphia hearing but not in Baltimore. The individual referred to in the text, whose perjury petitioner is charged with procuring in count 2 of the instant indictment, testified only at the second Baltimore hearing.

of Kostatos in obstruction of the immigration laws (8 U.S.C. 1251–1252; count 2). (App. 10–13). Two of the eight overt acts charged to have been committed in furtherance of each of the conspiracies were Kostatos' February 14 testimony and Sitaras' June 16 testimony (App. 11). The other overt acts involved the making of false affidavits and the oral testimony of various witnesses at the deportation hearings (App. 11–12). Upon petitioner's plea of nolo contendere to count 1 of the conspiracy indictment, he was fined $500 and sentenced to imprisonment for 2 months. Count 2 of the indictment was dismissed (App. 20–22, 28).[3]

The instant case arises from the indictment returned on August 21, 1956, in the District Court for the District of Maryland, charging petitioner with suborning the perjury of Kostatos committed at the February 14 hearing and that of Sitaras committed at the June 16 hearing (App. 1–4). Petitioner's motion to dismiss on the ground of double jeopardy was denied by the district judge, who found that the Philadelphia conspiracy conviction was a separate and distinct offense from the instant subornation charges (App. 5–9; 147 F. Supp. 791).

[3] His co-defendants, including Kostatos, had entered pleas of guilty to count 1. Count 2 was withdrawn as to them as well (App. 27–28).

There was also dismissed a second indictment charging petitioner with subornation of perjury at the *Philadelphia* hearing on April 24, 1952 (to be distinguished from the indictment in the present case which charges subornation of perjury at the *Baltimore* hearings on February 14 and June 16) (App. 24, 28).

DISCUSSION

1. The single contention advanced by petitioner is that his conviction for subornation of perjury violates the double jeopardy provision of the Fifth Amendment since the gist of that offense is the same as the conspiracy charge on which he was convicted in the District Court for the Eastern District of Pennsylvania. He points out that two of the overt acts charged to have been committed in furtherance of the conspiracy are the acts on which the present subornation charges are founded.

As petitioner acknowledges, "It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both". *Pereira* v. *United States*, 347 U.S. 1, 11; *Pinkerton* v. *United States*, 328 U.S. 640; *United States* v. *Bayer*, 331 U.S. 532. It is equally clear that "the same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself * * * ". *Bayer*, *supra*, at p. 542. Petitioner, however, attempts to bring this case within a recognized exception that where the core of the substantive offense is a joint agreement, and there is no element in it different from that in the conspiracy, conviction for both cannot stand. *Pereira*, *supra*, at 11; *Pinkerton*, *supra*, at 644; *Gebardi* v. *United States*, 287 U.S. 112, 122; *United States* v. *Katz*, 271 U.S. 354, 355. This is not such a case.

In the first place, the conspiracy to which petitioner entered a plea of nolo contendere was not a conspiracy to suborn perjury, but a conspiracy to make false and fraudulent statements to an agency of the United States, in violation of 18 U.S.C. 1001. That might or might not involve perjury. Even if the false statement were not given under oath and did not amount to perjury in the technical sense, it could still fall within the purview of that section.

On the other hand, on a charge of subornation of perjury, it must be proved, by the same quantum of evidence necessary to sustain a charge of perjury, that false testimony was in fact given under oath before a competent tribunal. *Hammer* v. *United States*, 271 U.S. 620. Hence the first conspiracy charge against petitioner was not the same as a charge of conspiracy to suborn perjury.

In the second place, as the district judge pointed out: "The essence of the conspiracy charge was the agreement * * *; the essence of the charge in the case pending in this court is that Petite procured and suborned Kostatos and Sitaras to commit perjury. To 'procure' and to 'suborn' mean to contrive, to cause, to induce, to instigate; and agreement is not a necessary element, although frequently present." (Pet. App. 4a). If a person coerced another into committing perjury by the use of threats, he would suborn perjury (cf. Wharton, *Criminal Law and Procedure* (12th ed.), §1327, p. 695; 4 A.L.R. 1308, 1319) even though under such a set of facts there would be no agreement sufficient to support a charge of conspiracy. This Court held in *Burton* v. *United States*, 202 U.S. 344, 377,

that agreement to receive a bribe and receiving a bribe are separate crimes. It held in *United States* v. *Bayer*, 331 U.S. 532, 541, that a trial by court-martial for illegally receiving monies to effect personnel transfers did not bar a subsequent conviction with others for illegally agreeing to effect such transfers, since receipt of money did not necessarily involve agreement. See also *Fall* v. *United States*, 49 F. 2d 506, 510–511 (C.A.D.C.), certiorari denied, 283 U.S. 867, in which an acquittal of two persons of conspiracy to defraud the United States was held not to bar the subsequent trial of one for the substantive offense of bribery since one of the two might have acted in good faith. And in *Pereira* v. *United States*, 347 U.S. 1, 11, this Court held that one who aided and abetted the commission of the substantive offense could also be found guilty of conspiracy since "aiding, abetting, and counseling are not terms which pre-suppose the existence of an agreement". In all these situations agreement would often be involved in the substantive offense, but not necessarily always. That is also the situation here.

2. For the foregoing reasons, we believe that the decision below is correct, as a matter of law, both on authority and on reason. It is recognized, however, that the subject of separate punishments for related acts is one that has traditionally commanded the Court's attention; that this general subject has recently been considered by the Court and will again be considered at the next Term; and that the precise issue here—the relationship of the crimes of subornation of perjury and of conspiracy to submit false statements—is

one that has not previously come before the Court. We do not deny, therefore, that the legal question presented is appropriate for review by this Court at this time and, accordingly, do not oppose the granting of the writ in this case.

3. The Court should be informed that the case is now under study by the Department of Justice to determine whether the initiation of the second prosecution was consistent with the policy of the Department with respect to separate prosecutions for related acts--a policy reflected, for example, in the recent statement by the Attorney General, occasioned by the decision of this Court in *Abbate* v. *United States*, 359 U.S. 187, directing the United States Attorneys to obtain prior Department of Justice approval before prosecuting cases in which a state prosecution has already been had for substantially the same acts. Department of Justice Press Release, April 6, 1959. Also under study is the further question whether, if not, the Attorney General has and should exercise the power, at this stage of the case, to seek vacation of the judgment of conviction and dismissal of the indictment.

CONCLUSION

For the reasons stated, the Government does not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted,

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